BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VENISEA JOHNSON	)	
Claimant	)	
	)	
VS.	)	
	)	
COMMUNITYWORKS	)	
Respondent	)	Docket No. 1,053,844
	)	
AND	)	
	)	
AMERICAN FAMILY MUTUAL INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the May 17, 2011, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Steffanie Stracke, of Kansas City, Missouri, appeared for claimant. Daniel N. Allmayer, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found claimant failed to prove by a preponderance of credible evidence that she was injured in the course and scope of employment on October 14, 2010, and therefore denied claimant's request for medical and temporary total disability benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 11, 2011, Preliminary Hearing and the exhibits, the deposition of Venisea Johnson taken January 12, 2011, and the deposition of Steve Wilson taken May 13, 2011, together with the pleadings contained in the administrative file.

ISSUES

The claimant requests review of whether she sustained an accidental injury in the course and scope of her employment.

Respondent argues that the Order should be affirmed.

The issue for the Board's review is: Did claimant sustain an accidental injury that arose out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant is currently unemployed and last worked on October 14, 2010, when she claims she was injured while working for respondent. Claimant began working for respondent in June 2010 and was assigned to take care of a client named Jerry Robillard, who lived at the Poplar Court Apartments. Claimant testified that her job duties were to get Mr. Robillard out of bed, showered, shaved and fed breakfast. Claimant was also responsible for making sure that Mr. Robillard's apartment was clean, which included vacuuming, making the bed, doing dishes and washing clothes. If he had meetings with his therapists, she would either take him downstairs to meet them or the therapist would come up and knock on the apartment door.[1]

Claimant testified that on October 14, 2010, Mr. Robillard had an appointment with his transitional living therapist. She believes the therapist came up to the apartment, but she accompanied the therapist and Mr. Robillard downstairs around noon. Claimant testified that when Mr. Robillard goes for therapy, she usually stays around his apartment and waits for him to return. She is considered to be off the clock during this time. On this day, however, claimant had planned to go to lunch while Mr. Robillard was gone. She testified that after the therapist and Mr. Robillard left, she went back up to the apartment to get her purse and use the restroom. She then planned to go to lunch. However, when she walked into Mr. Robillard's bathroom, she slipped and fell.

Several witnesses confirmed that the apartment above Mr. Robillard's had a leak the day before, and Mr. Robillard's apartment had been flooded. On October 14, 2010, the maintenance man sprayed some kind of liquid in Mr. Robillard's apartment for mildew. This occurred shortly before the therapist came to pick up Mr. Robillard. Claimant contends the bathroom floor was still wet when she went back up to the apartment to use the restroom, and that is what caused her to slip and fall. Claimant denied she had been warned that some of the spray may have gotten on the bathroom floor and that it would take a few minutes to dry. Claimant testified she bruised her back and buttocks and twisted her right ankle in the fall.

After claimant fell, she got herself up from the bathroom floor, went out to her car and called her supervisor from her cell phone. She was instructed to go to Concentra to be checked out and told someone would be called to cover her shift. Because claimant's move to the area was fairly recent, she was not familiar with where Concentra was located, so she went home to wait for someone to take her. She had been told that Concentra closed at 10 p.m., however after someone got home to take her and they arrived at

[1] Claimant had several therapists that came to see him at various times each day.

Concentra it was closed. The next day she had no ride to get to Concentra and then it was the weekend, so claimant had to wait until Monday, October 18 to be seen at Concentra. Concentra records from October 18, 2010, show that she complained of low back and left ankle pain after falling on a slippery surface.

Claimant admits to falling and breaking her leg in the winter of 2009. She also admitted to being treated for weakness, fatigue, left-sided pain and a feeling of falling four weeks before the October 2010 accident. Claimant testified that at that time she was having problems in the left side of her head. She denied any previous problems with her low back. She admits to using a cane before the October 2010 accident, but she claims she did not bring it with her to work everyday. She testified she has regularly used a cane since her fall in October 2010.

Steve Wilson testified that he formerly worked for respondent as a transitional living specialist. As such, he was basically an on-call nurse and managed clients' money, made appointments, and helped clients get their lives in order. Mr. Wilson testified that during part of his employment with respondent, he was assigned to work with Mr. Robillard. On average, he picked Mr. Robillard up four times a week for therapy. He indicated that the activities would vary, but he always picked him up around 12:00 p.m. He testified that 95 percent of the time he would go up to Mr. Robillard's apartment and get him, but sometimes he would meet him in the parking lot. He testified that whoever was working with Mr. Robillard would bring him down to the car on those days. Mr. Wilson testified that as soon as he appears to pick up Mr. Robillard, claimant is no longer on the clock and is free to do what she wants until he and Mr. Robillard return. Mr. Wilson testified that claimant never stays in Mr. Robillard's apartment while they are gone.

Mr. Wilson said on October 14, 2010, he picked Mr. Robillard up at his apartment at about 11:55 a.m. He, claimant and Mr. Robillard locked the apartment and went downstairs together. In a statement Mr. Wilson gave to Dorothy Resch[2] on November 9, 2010, he said that when he left with Mr. Robillard, claimant was outside the building talking to some other residents of the building. At his deposition, he testified claimant had her coat on and was carrying a purse.[3] He admitted he did not see claimant walk to her vehicle or drive away. He stated that he took Mr. Robillard to the gym, but Mr. Robillard did not want to work out that day, so they came back to the apartment. They had only been gone about 30 minutes. Mr. Wilson testified that he learned of claimant's accident when he received a call from claimant's supervisor about 12:15 on October 14. Mr. Wilson said he was back in Mr. Robillard's apartment when he got the call, and claimant was not in the

---

[2] Ms. Resch is not identified. Mr. Wilson assumed she worked for an insurance company.

[3] Mr. Wilson did not mention in his statement that claimant had a purse with her when she walked out with Mr. Robillard. He indicated in the statement that claimant was wearing a coat and hat when she left the apartment and walked outside.

building at that time. He had to stay with Mr. Robillard until a replacement showed up. He said he did not see any slick spots in the apartment, nor was the floor wet.

It is Mr. Wilson's opinion that claimant is faking her injury because when he picked up Mr. Robillard on October 14, 2010, claimant had her coat on and her purse with her as if she were leaving. He also said that claimant never went back up to the apartment after she brought Mr. Robillard down. Mr. Wilson testified claimant would not have wanted to go back up and use Mr. Robillard's restroom, stating:

> Jerry is a handicapped individual. When he uses the rest room in his bathroom, he makes a mess. There is–you do not want to go in his bathroom and do anything. There's a fresh, clean bathroom downstairs on the main-lobby floor. She has no reason to go back upstairs. I had the keys to get in. She didn't even have the keys anymore.[4]

He went on to state that he knew claimant was lying about what happened because ". . . I was there, and Venisea has lied in the past on different other situations that we've been involved in."[5] He went on to indicate that he believes claimant filed a workers compensation claim because she was afraid of losing her job after having been caught in four or five lies. Mr. Wilson admitted that he disliked claimant.

Richard Reever, maintenance man for Poplar Hills Apartments, testified that at least a day before the accident he was called to Mr. Robillard's apartment to spray for mildew after it had been flooded from the apartment above it. Mr. Reever testified that claimant was present when he and the carpet cleaner showed up to spray. He testified the carpet cleaner told claimant the bathroom floor was a little damp. The carpet cleaner said the spray would only take two to three minutes to dry. Mr. Reever went on to testify that by the time he and the carpet cleaner left, it had been more than three minutes. Mr. Reever couldn't say how wet the floor actually was because he did not go into the bathroom.

Mr. Reever testified that one time claimant told him she was going to quit her job because Mr. Robillard's sister had left her a note with a list of tasks to complete. Claimant told Mr. Reever she was tired of receiving notes from Mr. Robillard's sister. He could not remember when he and claimant had that conversation.

Marsha Truta, property manager for the Poplar Court Apartments, testified that she regularly saw the claimant with Mr. Robillard. She testified that while Mr. Robillard was at therapy, claimant would visit with the other residents from the building in the atrium until Mr. Robillard got back. Ms. Truta stated that she did not see claimant in the building on

---

[4] Wilson Depo. at 13. Mr. Wilson testified that claimant had her own set of keys to Mr. Robillard's apartment, but he did not think she had them the day of her alleged accident because Mr. Robillard had them. Wilson Depo. at 21.

[5] Wilson Depo. at 14.

October 14, 2010, but did see her at Christmastime at a casino. She said claimant did not have a cane with her at the casino.[6]

Marjorie Jouras, sister and legal caretaker to Mr. Robillard, testified that her brother was in need of assistance 24 hours a day after suffering brain damage in an accident. Ms. Jouras testified that claimant's mother, Muriel, had been claimant's primary caretaker. Muriel stopped working with Mr. Robillard in August or September 2010, after suffering a stroke, and claimant took over care for Mr. Robillard. In the beginning, Ms. Jouras felt that claimant was doing an excellent job caring for her brother. Ms. Jouras later became dissatisfied with claimant's care of her brother's apartment. She said one of the therapists complained to her that claimant would sometimes not have Mr. Robillard up, dressed and ready to go for his session, and the therapist would have to get him ready while claimant sat on the couch huddled in a blanket. She also testified that claimant was supposed to be teaching Jerry to do his own laundry as part of his therapy, but claimant would ask someone else to do Mr. Robillard's laundry and would tell the person to keep whatever quarters were left. Ms. Jouras further testified that the last few weeks claimant worked with Mr. Robillard, she did not do as good a job of keeping the apartment clean as she had earlier. Ms. Jouras said she started leaving notes to claimant the last week claimant worked with her brother. The notes included a list of tasks Ms. Jouras wanted claimant to perform in her job of taking care of Mr. Robillard. The list included documenting the amount of money claimant had in his wallet and how many quarters were used in doing his laundry.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[7] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

---

[6] Claimant denied ever being in a casino.

[7] K.S.A. 2010 Supp. 44-501(a).

[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[9]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[11]

ANALYSIS AND CONCLUSION

The ALJ determined that claimant failed to prove she was injured in the course and scope of her employment and denied claimant's request for compensation. A reading of the ALJ's order reveals that the ALJ was not persuaded that claimant's injuries were due to a slip and fall on October 14, 2010 as alleged by the claimant. Clearly, the ALJ did not find claimant's testimony credible. Claimant testified in person before the ALJ at the May 11, 2011 Preliminary Hearing, as did Mr. Reever, Ms. Truta and Ms. Journas. Mr. Wilson testified later by deposition. In addition, claimant's deposition testimony given on January 12, 2011 was made a part of the evidentiary record.

This Board Member, as a trier of fact, must decide which testimony is more accurate and/or more credible. Although claimant's alleged slip and fall was unwitnessed, the other witnesses who testified contradicted certain portions of claimant's testimony concerning the facts and circumstances surrounding the alleged accident. Where there is conflicting testimony, as in this case, the credibility of the respective witnesses is even more important

---

[9] *Id.* at 278.

[10] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. _, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[11] K.S.A. 2010 Supp. 44-555c(k).

to the determination of the issues in dispute. In denying claimant's request for preliminary benefits, the ALJ believed Mr. Wilson's testimony over the testimony of claimant. In his Order, the ALJ specifically mentions that claimant had possible motivations to fabricate a work injury whereas Mr. Wilson had no clear reasons to lie. Although the ALJ made no specific finding as to claimant's credibility, the ALJ found that claimant failed to prove she suffered an accident and injury at work on October 14, 2010, that arose out of and in the course of her employment with respondent. As such, the ALJ must have given less weight to claimant's testimony.

As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*[12], appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."[13]

Here, the ALJ had the opportunity to personally observe the claimant's testimony. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ was able to observe the testimony in person. Having reviewed the entire record presented to date, this Board Member agrees that claimant has failed to prove she suffered a work-related accident.

ORDER

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated May 17, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2011.

_____
DUNCAN A. WHITTIER
BOARD MEMBER

c: Steffanie Stracke, Attorney for Claimant
Daniel N. Allmayer, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

---

[12] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, unpublished Kansas Court of Appeals opinion, 2011 WL 1878130 (Kan. App. filed May 6, 2011).

[13] *State v. Scaife,* 286 Kan. 614, 624, 186 P.3d 755 (2008).